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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

In re K.T., a Person Coming Under the Juvenile Court Law.	
STANISLAUS COUNTY COMMUNITY SERVICES AGENCY, Plaintiff and Respondent, v. J.T., Defendant and Appellant.	F058338 (Super. Ct. No. 515382) **OPINION**

APPEAL from a judgment of the Superior Court of Stanislaus County. Nancy B. Williamsen, Commissioner.

Robert McLaughlin, under appointment by the Court of Appeal, for Defendant and Appellant.

John P. Doering, County Counsel, and Carrie M. Stephens, Deputy County Counsel, for Plaintiff and Respondent.

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INTRODUCTION

Appellant J.T. assaulted and beat his girlfriend, L.M., four days before L.M. gave birth to K.T. (the minor). K.T. was taken into protective custody at birth and a petition was filed in the Juvenile Court of Stanislaus County pursuant to Welfare and Institutions Code[1] section 300. The court found appellant was an alleged father and denied visitation and reunification services. Appellant was subsequently determined to be the minor's biological father. Several months later, he filed a section 388 petition for modification and argued his status as a biological father required the court to find he was a presumed father so that he could receive services and visitation. The court denied the petition. On appeal appellant contends the court improperly denied his petition for modification, and it should have found he was a presumed father and entitled to visitation and reunification services. We will affirm.

FACTS

Around 6:30 p.m. on November 16, 2008, officers from the Turlock Police Department responded to the apartment where L.M. lived with appellant. L.M. was screaming and crying and she said appellant had assaulted her. L.M. was eight months pregnant with K.T. and said appellant was the child's father.

L.M. said the incident began around 4:30 p.m., when appellant returned home from his job and started to drink. L.M. asked him to stop drinking so they could go shopping for their baby. Appellant became very angry and twice slapped L.M. on the left side of her face. L.M. sat down and appellant kicked her twice in the head. Appellant was wearing shoes with thick rubber soles.

L.M. felt nauseous from being slapped and kicked, so she went into the bathroom and sat on the toilet. Appellant followed her into the bathroom, placed his hands on her

[1] All statutory citations are to the Welfare and Institutions Code unless otherwise indicated.

shoulders, and kept her on the toilet. L.M. tried to get away from him, but appellant would not let her go and she could not get his hands off her. L.M. repeatedly asked appellant to leave her alone and he refused.

L.M. said appellant kept her in the bathroom for over five minutes. He placed both his hands around her neck and began to strangle her. L.M. did not lose consciousness but she began "'getting very dizzy and seeing stars.'" L.M. thought she was going to die if appellant did not let go of her neck. She lost control of her bladder and urinated on herself. Appellant choked her for close to two minutes. As he strangled her, appellant became very angry and yelled, "'I'm going to make you have this baby here. I don't want you to do it at a hospital.'" Appellant repeatedly stomped on L.M.'s feet. He held a pair of scissors, cut L.M.'s hair, and yelled, "'If you're going to leave me, I'll make you ugly so no one will want you.'"

L.M. said appellant dragged her out of the bathroom against her will. He held her hair and dragged her down the stairs and into the living room. Once they were downstairs, appellant let her go so he could use the restroom, and L.M. called the police. L.M. said appellant fled on a bicycle when he realized she had called for help.

L.M. squeezed an officer's arm to show how much pressure appellant applied to her throat, and the officer believed that amount of pressure would have cut off her oxygen supply. L.M. said appellant had physically abused her on multiple occasions in the past, she never reported the incidents, and she was afraid of appellant.

The officers drove around the area and found defendant riding a bicycle away from the scene. The officers activated the patrol car's emergency lights and verbally ordered him to stop. Appellant ignored the officers' repeated commands to stop, and he dropped his bicycle and ran away. The officers chased him and repeatedly ordered him to stop. Appellant continued to ignore their orders and kept running, and he was eventually apprehended. Appellant said he had his medication, but he lost control because he lost his medication.

L.M. was transported to the hospital and treated for pain in her feet, head, and neck, and visible swelling on the left side of her face. She was also checked to make sure her unborn child was not injured. L.M. was provided with an emergency protective order, and the order was served on defendant in jail.

Appellant was charged with attempted murder (Pen. Code, § § 664/187, subd. (a)), corporal injury on a spouse/cohabitant (Pen. Code, § 273.5, subd. (a)), false imprisonment (Pen. Code, § 236), criminal threats (Pen. Code, § 422), and resisting or obstructing an officer (Pen. Code, § 148, subd. (a)(1)). He was held on $500,000 bail and remained in custody. Appellant's prior record included two arrests and convictions for driving under the influence.

The minor's birth and detention

On November 20, 2008, four days after appellant assaulted L.M., she gave birth to K.T. (the minor) in the hospital. L.M. tested positive for Vicodin at the time of the minor's birth. L.M. stated appellant was the minor's father, she had been living with appellant for two years, they were living together when the minor was conceived, but she was not married to appellant. Appellant was incarcerated when the minor was born and did not sign a paternity declaration.

The minor was taken into protective custody at birth and remained in foster care for the duration of the instant dependency proceedings. The minor did not have any medical or developmental problems. A few days after the minor's birth, L.M. met with a social worker and reported her only addiction was to methamphetamine. L.M. denied having a prior problem with prescription pain medication.

The social worker also met with appellant, who was in local custody, and asked him about the incident with L.M. Appellant stated that L.M. pushed him "about going to the store and buying baby's stuff." Appellant told L.M. that she could buy things for the baby when her mother arrived for a visit, and he only made $40 that week and just had

$30 left. Appellant said L.M. "was pushing me. I pushed her back. I didn't do anything else," and he left the house.

Appellant reported he had a history of schizophrenia and took Seroquel. Appellant also said he had been drinking on the day of the incident, and he had not taken his medication for seven days. Appellant denied being in a domestic violence relationship with L.M.

L.M.'s prior history

L.M. previously had been involved with child welfare services in Colusa County because of a domestic violence incident that did not involve appellant. In September 2006, L.M.'s then-boyfriend, E.T., threw a chair at her, choked her, and bit her. She suffered bruises on her body and marks around her throat. L.M.'s two-year-old son was present during the assault but in another room. L.M. and E.T. were living together but he was not the child's father.

As a result of the assault, E.T. was arrested but L.M. subsequently allowed him back into the home, despite being advised about her responsibility to protect her son from domestic violence. L.M. was deceptive with law enforcement and social workers about E.T.'s presence in her home, and she was arrested for obstructing a police officer.

In November 2006, L.M.'s son was removed from her care. In the course of the dependency proceedings, L.M. initially admitted she had been abusing Vicodin for a couple of years, and she tested positive for methamphetamine, opiates, and marijuana. She later denied having a problem with prescription pain medication and claimed she was only addicted to methamphetamine.

L.M. received family reunification services but she left a drug treatment program before completing it, her whereabouts became unknown, and she did not complete the case plan. In August 2007, the court terminated her parental rights to her son.

The petition

The instant dependency proceedings as to the minor K.T. began on November 25, 2008, when the Stanislaus County Community Services Agency (respondent) filed a petition in the Juvenile Court of Stanislaus County, which alleged the minor was within the court's jurisdiction because there was a substantial risk the child would suffer serious physical harm or illness by the parents' inability to provide regular care because of mental illness or substance abuse (§ 300, subd. (b)), the child was left without any provision or support because a parent was incarcerated (§ 300, subd. (g)), and the minor's older half-sibling had been abused or neglected (§ 300, subd. (i)).

As to appellant, the petition identified him as the alleged father, who was in custody and charged with multiple offenses arising from the domestic violence incident against L.M., that appellant believed he had been diagnosed with schizophrenia and reported he had not been taking his medication at the time of the domestic violence incident. He had a criminal history which included two arrests and convictions for driving under the influence.

As to L.M., the petition alleged that she tested positive for Vicodin at the minor's birth. She had a history of being addicted to pain medication and methamphetamine, being in relationships involving domestic violence, and having mental health issues. She had a prior case with child welfare services in which her parental rights for her older child were terminated when she failed to complete her case plan.

On November 26, 2008, the court conducted the detention hearing, appointed attorneys for L.M., appellant, and the minor, and found a prima facie showing had been made to support the detention. The court found appellant was an alleged father because he was not married to L.M. and a paternity declaration was not executed when the minor was born.

The jurisdiction/disposition hearing

On December 17, 2008, the court granted appellant's motion for DNA tests to determine the minor's paternity.

On January 6, 2009, the court conducted the joint jurisdiction/disposition hearing. Appellant and L.M. were present with their attorneys, they waived their rights, and they submitted the petition on respondent's report. Appellant was still in custody on the charges arising from the domestic violence incident.

The court determined the petition's allegations were true and adjudged the minor a dependent child. The court advised appellant and L.M. that the reunification period would be six months and parental rights could be terminated if they were not able to resume custody within that period. The court ordered reunification services and visitation for L.M. The court denied services and visitation to appellant because he was only an alleged father. The court scheduled a paternity hearing for February 17, 2009, and the six-month review hearing for June 9, 2009.

The paternity results

On January 23, 2009, the DNA tests indicated that appellant could not be excluded as the minor's biological father and there was a 99.94 percent probability of paternity.

On February 10, 2009, respondent filed a motion for the court to declare appellant was the minor's biological father and enter a judgment of paternity, but argued that visits between appellant and the minor should not occur while he was in custody, but he should receive photographs of the minor.

On February 17, 2009, the court convened the paternity hearing; appellant was present with his attorney. The court found appellant was the minor's biological father. Appellant's counsel requested the court to order reunification services and visitation because appellant was in custody at the honor farm and the facility provided in-person visitation and reunification programs. Counsel stated that "[i]f the Court is not inclined to

order that today, then we will follow-up with the [section] 388" petition for modification of its prior order, which denied reunification services and visitation.

The minor's attorney argued appellant's biological status did not make him a presumed father, and visits at the jail were not in the three-month-old minor's best interests. The minor's attorney pointed out that appellant's release date was July 2009, and he would not be out within the six months assigned for the reunification process. Appellant's attorney argued that "[g]iven the new statutes that have been put in place," the court could consider appellant's custody status and programs that were available while he was incarcerated, but counsel did not specify which statutes applied.

The court stated that it would have to find detriment to deny visitation to a presumed father, but appellant was an alleged father and it was not required to make such a finding. "As to whether or not . . . services to [appellant] would be in this child's best interest, I'm not sure if that's been shown today that there would be, so I'm not going to be deciding whether or not services should be provided." The court found appellant was the minor's biological father, but visitation "is something entirely different. I think I need more information before I can make an order relative to—well, an order changing any previous visitation orders. So a [section] 388 petition would need to be filed."

On March 2, 2009, the court filed the order and judgment that appellant was the minor's biological father. The court did not provide any visitation or reunification services.

The section 366.21 report

During the period between March and June 2009, the court held review hearings as to L.M.'s participation in the reunification plan. The section 366.21 six-month review hearing was scheduled for June 9, 2009. Appellant did not file a section 388 petition for modification to request services or visitation.

On June 3, 2009, respondent filed a report as to L.M.'s progress with the reunification plan in anticipation of the upcoming section 366.21 status review hearing.

The minor was five months old, happy and healthy, and doing well in foster care. L.M. visited the minor twice a month and was very loving and nurturing toward the child, except for one visit when L.M. became frustrated and could not deal with the minor because she would not stop crying.

Respondent reported that L.M. had attended counseling and substance abuse programs, but she struggled with the reunification plan and had not made substantial progress. Respondent believed it was highly unlikely the minor would be able to return to L.M.'s custody. It would be detrimental to return the minor to L.M.'s custody because she was still in complete denial about her addiction to pain medication, and her dishonesty made L.M. "stagnant with no progression of moving forward." L.M. told the social worker that she thought she would be able "to skate through her programs" and get the minor back. However, L.M. continued to "manipulate" numerous service providers with little success. L.M. had been ordered to participate in the substance abuse family education court but she failed to follow the directives and she was removed from the program. Respondent recommended the court terminate L.M.'s reunification services and set a section 366.26 hearing for the permanent plan of adoption.

On June 9, 2009, the court granted L.M.'s request for a contested section 366.21 hearing.

Appellant's petition for modification

On June 16, 2009, appellant filed a section 388 petition for modification and requested the court grant him reunification services and visitation with the minor since he was the minor's biological father.

Appellant's petition stated he was in custody at the Stanislaus County Honor Farm but scheduled to be released on July 17, 2009.[2] Appellant declared he attended NA/AA meetings and parenting classes while in custody, and he could receive supervised visitation as part of the honor farm's parenting classes. Appellant further declared he was willing to sign a declaration of paternity with L.M., but L.M. was not willing to sign it and she was unilaterally trying to prevent appellant from becoming a presumed father.

Appellant argued he was a presumed father entitled to services and visitation pursuant to *Adoption of Kelsey S.* (1992) 1 Cal.4th 816 (*Kelsey S.*), and he did all that he reasonably could to demonstrate his commitment to the minor under the circumstances of his incarceration.

The court's evidentiary hearing

On July 14, 2009, the court conducted an evidentiary hearing on both appellant's section 388 petition for modification and the section 366.21 six-month review. At the hearing, appellant testified he was released on probation from Stanislaus County Honor Farm on July 8, 2009. While he was at the honor farm, he attended NA meetings and graduated from a seven week parenting program. The program involved two-hour sessions, twice a week for seven weeks, and he did "a lot of homework" and learned about providing for children and keeping them safe. When asked for an example of the type of matters they discussed in the program, appellant said he could not remember and kept his paperwork at home.

Appellant testified he wanted to have visits with the minor while he was in custody but it was not allowed. "That's why I got into the parenting classes, because you got a

[2] The instant record is silent as to the resolution of the multiple criminal charges filed against appellant for the assault on L.M., but he remained in custody from the time of his arrest in November 2008 until he was released in July 2009.

side thing that comes up. It's called 'Talk,' and they bring the children in on every Friday and allow you to see them."

Appellant testified he was willing to attend additional parenting classes, NA meetings, substance abuse treatment programs, and "do anything" necessary to parent the minor. Appellant testified he was not using any illegal substances and willing to submit to drug tests. Appellant had been released on three years of felony probation, but he had not met with his probation officer yet. He believed he had to take domestic violence and anger management classes and intended to enroll in them.

On cross-examination, appellant admitted he was arrested for the domestic violence incident against L.M., and she was pregnant with the minor at the time of the incident. Appellant was asked if the incident "included kicking her, and slapping her, and dragging her by the hair while she was pregnant with the minor." Appellant replied, "That's what she said."

"Q. Is that true?

"A. Not really."

Appellant testified he was living with L.M. prior to his arrest, and he went "to basically every doctor appointment that she had." When asked how many appointments she had, appellant testified: "I didn't keep count. We were always going to the doctor."

"Q. Okay. And was it more than one incident of domestic violence against [L.M.]?

"A. Not with me.

"Q. Okay. So if she had told that to the police, that would haven't [*sic*] been correct?

"A. Yeah, we've had one case."

Also on cross-examination, appellant testified the honor farm's parenting class was only a group program and did not involve any individual counseling. Appellant admitted

that he was taken into custody in November 2008 and he did not start the parenting class until May 2009. Appellant claimed he went to "as many [NA meetings] as I could get in," but admitted he did not start attending the meetings until April 2009 and only went "to a few." Appellant explained such classes were not offered at the jail, he had to wait until he was sent to the honor farm, and then he had to wait for the classes to start. There were more NA meetings offered at the honor farm but he could not always attend because of his assigned job.

Appellant admitted he had prior convictions for driving under the influence of alcohol in 2006 and 2008.

"Q. Okay. Do you consider yourself to be an alcoholic?

"A. Not anymore. I was.

"Q. And what kind of treatment have you had to deal with that?

"A. Just AA meetings and being in jail. I haven't had it around me, so.

"Q. Okay. So you got clean going to jail, and you have been out for about a week or so?

"A. Yes."

Appellant testified he had not consumed alcohol since he was released. He was not taking Seroquel for schizophrenia because "I haven't never been diagnosed properly. I need to get that done to see if I do even have it." Appellant admitted he previously took the medication, but he was not taking it when he assaulted L.M.

"Q. Okay. But do you think you need medication now?

"A. Not really."

Appellant testified he did not maintain a relationship with L.M. after his arrest, he had not been around her, and she had not written him while he was in jail, but L.M. deposited money in his jail account after he was arrested.

"Q. So you haven't been around her because you have been incarcerated. Do you plan to resume that relationship?

"A. Maybe."

Appellant testified he financially supported L.M. when she was pregnant and paid "for stuff for the baby," even though he only made $200 per week.

L.M. also testified at the hearing and said appellant "was very good when I was pregnant, except for the one incident." They had verbal arguments "but nothing physical, except for the one time." L.M. admitted that she told a different story to the police at the time of the incident, but explained that she was "so upset because of what had occurred, it might have been something that was probably misunderstood from my perspective. I do have a lot of other DV cases with other men."

"Q. Because the police report say you reported that there'd been multiple occasions where [appellant] physically abused you, but you didn't make a report.

"A. No, that's—I was very, very, very upset that night. A lot had just occurred, and they were slam dunking me with a 1,005 questions."

L.M. testified appellant "did the best he could to provide for me" financially while they lived together, and he bought some baby items for their child.

L.M. admitted she left the drug treatment program but she asked for services for a few more months "just to try to see if I can do it." L.M. felt the minor belonged with her foster parents because she did not know if she had a chance to regain custody. "Regardless if it's with me or with [the foster parents]. I want my daughter to have a good life."

Katherine Croom, the supervising social worker for this case, testified that since the six month status review report, L.M. left her treatment program, she was not in a clean and sober environment, she was no longer participating in a domestic violence program, and she was not willing to return to any of the programs. Ms. Croom opposed appellant's petition for modification because reunification and visitation were not in the infant's best

interests. Ms. Croom met appellant once and did not have further contact with him since he was not provided services.

The court's ruling

At the conclusion of the evidentiary hearing, the court denied appellant's petition for modification and made extensive findings.

> "What strikes this Court is that it was on February the 10th that notices were sent out for the paternity hearing, indicating that [respondent] was requesting that the Court answer a judgment of paternity, because there was testing that [appellant] was, in fact, the biological father. That was February 10th.
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> "On February 17th, the Court heard the matter, made a finding that [appellant] is the biological father, and ordered [respondent] to prepare and file a judgment. Four months later, a [section] 388 petition is filed. *It seems if [appellant] was really interested in reunifying with his child, and he felt that [section] 361.5(A) applied to him, and that he was the biological father, and services would benefit the child, I'm not even sure why we waited four months for this matter to be brought to the Court, but it was.* And even though there was a finding that he was the biological father, there was no request that the Court find that services would benefit the child, so the previous denial of services . . . continued. *So we have a significant lag in time where [appellant] did not request that this Court take any effort to assist him in reunifying with his child.*
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> "When [appellant] was at the Public Safety Center, the visitation was between glass, so that means that this very young child, an infant, almost seems cruel to have a child go to a visit with a parent between glass, when they cannot touch the parent, and [appellant] could not touch her. But yet, when he transferred to [a different facility],[3] and I'm not exactly sure when that was, but when that happened, at that time, his attorney did not bring a [section] 388 petition requesting that the Court modify the previous orders so that he could start engaging with this child, and possibly establishing a relationship. So here we are, at the time where services would be denied and—I'm sorry, here we are at the time where for a young child, services

[3] The court clarified that it was not informed when appellant was transferred from local custody to the honor farm.

would end, unless a parent has made substantial progress, and it is now that he is requesting that all of these services engage for him and his child.

"Frankly, the Court finds no evidence that services to [appellant] would, in any way, shape or form benefit this child. And that is the standard that has to occur, that the Court must determine that services will benefit the child and so, at this time, the Court is denying the [section] 388 petition . . . in that there is no showing that the orders requested would benefit [the minor]." (Italics added.)

The court turned to the section 366.21 six-month review and found that returning the minor to the custody of a parent continued to create a substantial risk of detriment, reasonable services had been provided to L.M., L.M. did not regularly participate in the services, she did not make substantial progress in her court-ordered treatment programs, and there was not a substantial probability that the minor would be returned to a parent's custody within six months. The court terminated reunification services to L.M. and set the matter for a section 366.26 hearing.

The court provided for L.M. to continue to receive visitation pending the next hearing. Appellant's counsel requested visitation include appellant. The minor's attorney objected because the minor had no relationship with appellant. The court ordered for both L.M. and appellant to have a minimum of one face-to-face visit per month.

DISCUSSION

DENIAL OF APPELLANT'S PETITION FOR MODIFICATION

Appellant filed both a notice of intent to file a writ petition and a notice of appeal to seek review of the juvenile court's denial of his section 388 petition for modification. He subsequently abandoned the writ and proceeded with the appeal. He contends the court abused its discretion when it denied his section 388 petition for modification, and it should have granted visitation and reunification services because he is the minor's biological father and a presumed father under *Kelsey S.*

We first note that once the court sets a section 366.26 hearing, the review of all orders issued at the hearing which set the order is by extraordinary writ petition rather

than by appeal. (*In re Anthony B.* (1999) 72 Cal.App.4th 1017, 1022-1023.) As we will explain, however, even assuming that we could review appellant's contentions, the entirety of the record reflects his arguments are meritless.

"Section 388 permits a parent to petition the court on the basis of a change of circumstances or new evidence for a hearing to change, modify or set aside a previous order in the dependency. The parent bears the burden of showing both a change of circumstance exists and that the proposed change is in the child's best interests. [Citation.]" (*In re Casey D.* (1999) 70 Cal.App.4th 38, 47.) A decision on a section 388 petition after an evidentiary hearing is "committed to the sound discretion of the juvenile court, and [that] court's ruling should not be disturbed on appeal unless an abuse of discretion is clearly established. [Citations.]" (*In re Stephanie M.* (1994) 7 Cal.4th 295, 318.) We review the facts most favorably to the judgment, drawing all reasonable inferences and resolving all conflicts in favor of the court's decision. (*In re Spencer W.* (1996) 48 Cal.App.4th 1647, 1650.)

A father's status is significant in dependency cases because it determines the extent to which the father may participate in the proceedings and the rights to which he is entitled. (*In re Christopher M.* (2003) 113 Cal.App.4th 155, 159.) " … California law distinguishes 'alleged,' 'biological,' and 'presumed' fathers. [Citation.] 'A man who may be the father of a child, but whose biological paternity has not been established, or, in the alternative, has not achieved presumed father status, is an "alleged" father. [Citation.]' [Citation.] 'A biological or natural father is one whose biological paternity has been established, but who has not achieved presumed father status....' [Citation.]" (*In re J.L.* (2008) 159 Cal.App.4th 1010, 1018 (*J.L.*).)

"'Presumed' fathers are accorded far greater parental rights than alleged or biological fathers. [Citation.] Presumed father status is governed by [Family Code] section 7611, which sets out several rebuttable presumptions under which a man may qualify for this status, generally by marrying or attempting to marry the child's mother or

by publicly acknowledging paternity and receiving the child into his home. [Citations.]" (*J.L., supra,* 159 Cal.App.4th at p. 1018.) "... [A] man who has neither legally married nor attempted to legally marry the child's natural mother cannot become a presumed father unless (1) he receives the child into his home and openly holds out the child as his natural child, or (2) both he and the natural mother execute a voluntary declaration of paternity. [Citations.]" (*Francisco G. v. Superior Court* (2001) 91 Cal.App.4th 586, 595-596.) An alleged father has the burden to establish his status as a presumed father by a preponderance of the evidence. (*Glen C. v. Superior Court* (2000) 78 Cal.App.4th 570, 585-586.)

"Presumed father status ranks highest." (*In re Jerry P.* (2002) 95 Cal.App.4th 793, 801 (*Jerry P.*).) "... [O]nly a presumed, not a mere biological, father is a 'parent' entitled to receive reunification services under section 361.5," and custody of the child under section 361.2. (*In re Zacharia D.* (1993) 6 Cal.4th 435, 451 (*Zacharia D.*); *Jerry P, supra,* 95 Cal.App.4th at p. 801.) "Biological fatherhood does not, in and of itself, qualify a man for presumed father status under [Family Code] section 7611. On the contrary, presumed father status is based on the familial relationship between the man and child, rather than any biological connection. [Citation.]" (*J.L., supra,* 159 Cal.App.4th at p. 1018.)

Appellant contends the court improperly denied his request for services and visitation with the minor "in the first instance," but the record supports the court's rulings in this case. At the time of the joint jurisdiction/disposition hearing, the court properly found appellant was an alleged father and not a presumed father because appellant and L.M. were not married when the minor was born and appellant did not sign the declaration of paternity. (See, e.g., *In re Vincent M.* (2008) 161 Cal.App.4th 943, 955-956.) Since appellant was an alleged father, he was not entitled to reunification services or visitation. (*In re O.S.* (2002) 102 Cal.App.4th 1402, 1410.)

The court also properly denied appellant's request for visitation and services at the February 2009 paternity hearing. While the court found appellant was the minor's biological father, that finding did not automatically entitle him to visitation or services, or to the rights or status of a presumed father. (*Zacharia D., supra*, 6 Cal.4th at p. 451; *Francisco G. v. Superior Court, supra*, 91 Cal.App.4th 586, 595-596.) "[T]he juvenile court 'may' order reunification services for a biological father if the court determines that the services will benefit the child. [Citation.]" (*Francisco G. v. Superior Court, supra*, 91 Cal.App.4th 586, 596.) As the court explained at the paternity hearing, it was willing to consider appellant's request for visitation or services, but appellant was still an alleged father and the court needed to hear additional evidence about the minor's best interests given the seriousness of the issues which triggered the dependency petition. Appellant's counsel declared that he would file a section 388 petition for modification, and the court agreed such a petition would be the appropriate vehicle to address whether appellant should receive visitation with the minor while he was in custody.

After the February 2009 paternity hearing, the court continued to monitor the minor's dependency through status hearings on L.M.'s progress, but appellant did not file a petition for modification until June 16, 2009, after he received notice of the section 366.21 hearing and intent to schedule a section 366.26 hearing.

Appellant contends the court should have granted his section 388 petition because his circumstances "substantially changed" once he was declared the minor's biological father. Appellant makes the rather circular argument that once the court found he was the minor's biological father at the February 2009 paternity hearing, that finding satisfied appellant's burden under section 388 to show new evidence or changed circumstances to obtain visitation and services. Aside from the fact of the DNA tests, however, appellant had accomplished very little to support his petition for modification. At the evidentiary hearing, appellant failed to explain why he delayed filing the petition. Instead, he testified that he completed a parenting class while in custody, he attended as many NA

meetings as possible, he had stopped drinking, and he was no longer an alcoholic. On further examination, appellant conceded the parenting classes merely consisted of written assignments, he could not independently recall the topics addressed in the classes, he did not receive individual counseling, he only attended a few NA meetings, he had not attended any programs to stop drinking, he only stopped drinking because he was in custody, he was on probation, and he had failed to report to his probation officer. Appellant's petition and hearing testimony failed to show changed circumstances, or that services and visitation would be in the minor's best interests.

Appellant contends the court should have extended reunification services to him under *Kelsey S.* To qualify as a *Kelsey S.* father, the child's biological father must show that he promptly stepped forward to assume full parental responsibilities for the child's well-being, the child's mother thwarted his efforts to assume his parental responsibilities, and that he demonstrated a willingness to assume full custody of the child. (*Kelsey S., supra,* 1 Cal.4th at p. 849.) "If an unwed father promptly comes forward and demonstrates a full commitment to his parental responsibilities—emotional, financial, and otherwise—his federal constitutional right to due process prohibits the termination of his parental relationship absent a showing of his unfitness as a parent. Absent such a showing, the child's well-being is presumptively best served by continuation of the father's parental relationship. Similarly, when the father has come forward to grasp his parental responsibilities, his parental rights are entitled to equal protection as those of the mother." (*Kelsey S., supra,* 1 Cal.4th at p. 849, fn. omitted.)

Appellant contends the court should have found he was a presumed father under *Kelsey S.* based on his actions "both before and after" the minor's birth. Appellant's *Kelsey S.* argument is based on his hearing testimony that he took L.M. to all her prenatal appointments and provided financial support. While appellant acknowledges L.M.'s allegations that he choked and stomped her and dragged her down the stairs, he cites to L.M.'s hearing testimony, that appellant was very good to her when she was pregnant, he

did not commit any other acts of domestic violence against her, and the police misunderstood her statements to the contrary. Appellant asserts the court and respondent "thwart[ed] his efforts" to establish a relationship with the child after she was born.

Appellant's arguments are not persuasive. Appellant is correct that "[t]here is no 'Go to jail, lose your child' rule in California. [Citation.]" (*In re S. D.* (2002) 99 Cal.App.4th 1068, 1077.) However, that is not what happened in this case. The only reason appellant was in jail when the minor was born was because he viciously beat L.M. just four days before the birth of his child. The violent attack was triggered by L.M.'s request for appellant to stop drinking so they could purchase things for the baby. Appellant refused to stop drinking, and he told L.M. that her mother could buy what she wanted for the baby on her next visit. Appellant then slapped and kicked L.M., and choked her so that she almost lost consciousness. Appellant refused to let her leave the bathroom and threatened to make her "have this baby here. I don't want you to do it at a hospital." Appellant stomped on L.M.'s feet, cut her hair, and declared that if she was going to leave him, he would make her ugly so no one else would want her. He then dragged her down the stairs by holding her hair. When the officers responded to L.M.'s 911 call, she had visible swelling on the left side of her face and appellant had fled. L.M. told the officers that appellant physically abused her on multiple occasions, but she never reported the prior incidents and she was afraid of him. She asked for and received an emergency protective order. The officers found appellant near the residence but he repeatedly refused to obey their commands to stop, he ran away, and he was eventually apprehended.

At the evidentiary hearing, both appellant and L.M. tried to minimize the seriousness of the assault. Appellant was asked if he was arrested because he kicked and slapped L.M. and dragged her by her hair, when she was pregnant with the minor. Appellant replied, "That's what she said," but insisted it was "[n]ot really" true. When asked if L.M. correctly reported there was more than one incident of domestic violence

between them, appellant said "we've had one case." Appellant's response was technically accurate since there was only one criminal case filed against him, but he failed to respond as to whether other incidents occurred between them. Appellant claimed he did not have any contact with L.M. while he was in custody but admitted she placed money on his jail account when he was arrested, and that he might resume their relationship. L.M. testified appellant was "very good" to her during her pregnancy with the minor, there was "nothing physical, except for the one time," and she was very upset when she spoke to the officers and did not understand their questions.

Kelsey S. "clearly direct[s] the trial court ... to take evidence and decide 'the threshold constitutional question of whether [the father] demonstrated a sufficient commitment to his parental responsibilities ... in the first instance.' [Citation.] If the trial court [finds] no such demonstration, 'that will be the end of the matter' because the best interest question has already been determined. [Citation.]" (*Adoption of Alexander M.* (2001) 94 Cal.App.4th 430, 440.) This case did not involve a situation where appellant was prevented from developing a relationship with the minor because L.M.'s pregnancy was hidden from him or that he was otherwise unaware of the child's existence. Instead, he brutally assaulted L.M. just days before she was going to give birth because she "pushed" him by asking him to buy things for the baby, and later tried to downplay the viciousness of the assault. The court properly rejected the credibility of both appellant and L.M. on these issues given the entirety of the record.

Appellant contends the court failed to consider recent modifications to section 361.5, subdivision (a)(3), that the court is not required to limit reunification services to six months for an incarcerated parent if the minor is under the age of three. (*In re Kevin N.* (2007) 148 Cal.App.4th 1339, 1343; *S.T. v. Superior Court* (2009) 177 Cal.App.4th 1009, 1017.) These provisions are only applicable to presumed fathers, and are not applicable to the instant situation given appellant's complete failure to show a sincere

desire to parent the minor. (Cf. *S.T. v. Superior Court, supra*, 177 Cal.App.4th at p. 1017.)

"The biological connection between father and child is unique and worthy of constitutional protection *if* the father grasps the opportunity to develop that biological connection into a full and enduring relationship." (*Kelsey S., supra,* 1 Cal.4th at p. 838, italics added.) "[I]nterpreting 'parent' to include a strictly biological father would introduce into the dependency context fathers who had never demonstrated any commitment to the child's welfare. [Citation.]" (*Zacharia D., supra*, 6 Cal.4th at p. 451.) The court did not abuse its discretion when it denied appellant's section 388 petition for modification. Appellant's status as a biological father did not require the court to grant services and visitation, and he failed to carry his burden to prove he was a statutorily presumed or *Kelsey S.* father.

DISPOSITION

The judgment is affirmed.

_____
Poochigian, J.

WE CONCUR:

_____
Wiseman, Acting P.J.

_____
Cornell, J.